United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2626

To be argued by
VINCENT L. LEIBELL, JR.

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

JORDAN INTERNATIONAL COMPANY,

Plaintiff-Appellant,

against

S.S. "PIRAN", her engines, boilers, etc.,

and

FEDERAL COMMERCE & NAVIGATION CO., LTD., and SPLOSNA PLOVBA,

Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANT

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The Issues Presented for Review

1. Can an ocean carrier rely upon "the one big wave" theory (a wave which no one saw, heard or felt) as the cause of the damage, particularly when in doing so, it ignores not only the testimony of those on board its own vessel, but also the entries in the vessel's log? To put it another way, must a defendant in order to support its burden of proof—as to an excepted cause for which it is not liable—affirmatively show just what was the cause of the damage?

2. Is an ocean carrier required to produce clear and affirmative proof, as to the seaworthy condition of its vessel at the commencement of the voyage, in order to overcome

the presumption of unseaworthiness resulting from the entry of large quantities of seawater into one of its cargo holds during the voyage?

3. What is the quality of proof required of the owner of an unseaworthy vessel, in order for it to sustain its heavy burden of proof that it used due diligence to furnish a seaworthy vessel?

Statement of the Case

This is an appeal by plaintiff, Jordan International Company, from a final judgment (A 16)* in an admiralty action in the Southern District of New York (Griesa, J.), which dismissed plaintiff's complaint against the vessel *in rem*, and its owner and charterer *in personam* for damage by salt water to shipments of steel in coils carried aboard the S.S. "PIRAN" from Newport, Wales, to Bridgeport, Connecticut, during the months of January and February 1968.

The Facts

a. Concerning Plaintiff's Cargo.

Plaintiff, Jordan International Company, shipped a large quantity of steel products aboard the S.S. "PIRAN" from Newport, Wales, to Bridgeport, Connecticut, during the period from January 31, 1968 to February 10, 1968.

From this shipment, 170 coils of cold rolled steel sheets and 14 bundles of cold rolled steel sheets were damaged by salt water and are the subject of this litigation (A4).

During the trial it was conceded that Jordan was the proper party plaintiff (TM 116, 117).** It was also stipu-

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* "A" references are to pages in the Joint Appendix.

** TM references are to pages of Trial Minutes.

lated during the trial that all the damage to plaintiff's steel, stowed in Hold No. 1, was caused by salt water and that this steel was in good order and condition when loaded on the vessel at Newport (TM 82, 83).

It was agreed that the $500 per package limitation applied to the damaged steel (TM 471). The Court never determined the dollar value of plaintiff's loss, merely noting that Jordan claimed $92,000 in damages (after giving credit for salvage proceeds) while the defendants claimed that these damages were approximately $80,000 (A 5).

b. Concerning The Voyage Of The "Piran".

The "PIRAN" sailed from Newport on January 31, 1968 (TM 210) and arrived at Bridgeport on February 10, 1968 (Exhibit 2, p. 5).

The highest wind force on the Beaufort Scale experienced by the "PIRAN" during the voyage in question was Force 10 (A 33). This is not unusual in February (A 64). The Chief Mate had experienced more than Force 10 during previous voyages across the North Atlantic during the winter-time (A 31, 32). He would expect heavy weather at such a time (A 32). In fact, the weather he actually experienced during the voyage in question was "typical winter weather for the North Atlantic" (A 32).

All three of defendants' expert witnesses testified that February is one of the worst times of the year in the North Atlantic (A 51; Exhibit M, p. 5; Exhibit Q, pp. 5, 6).

During the morning of February 9, 1968—one day before the arrival of the vessel in Bridgeport—it was noticed that the No. 6 pontoon cover for the No. 1 hatch was bent and lying in the tween deck (A 29). The No. 5 pontoon cover was slightly bent but remained in place (A 29). In addition, according to the vessel's log for February 9, 1968, "There were noted few minor damages on the deck" (A 132).

The seawater in Hold No. 1, where plaintiff's steel was stowed, reached a height of 12 feet (TM 52).

It should be specifically noted, in any factual account of what actually transpired during the voyage of the "PIRAN", that no witness, who was aboard the vessel, ever testified to seeing, hearing or feeling any giant wave striking the vessel. In fact, their views of the weather during this February voyage can be summed up in the words of the Chief Mate, that they experienced "typical winter weather for the North Atlantic" (A 32).

c. Concerning The Bent No. 6 Pontoon Over The No. 1 Hatch.

The "PIRAN" was built in 1959, so that at the time of the voyage in question the vessel was nine years old (TM 339). Defense counsel conceded that there was no testimony available as to how the damaged pontoon was handled during the previous nine years (A 44).

A steel pontoon cover, such as the one damaged during the voyage, was about 25 feet long, five feet wide and a little over a foot deep, and the top plate was of steel 32-hundredths of an inch thick (A 7). These pontoon covers (there were thirty-six required to cover the "PIRAN's" six holds) were movable, interchangeable and replaceable. They could be piled up on deck (A 85); (Picture No. 10 in Exhibit 2, at E 3).***

A picture of the damaged, rusty pontoon cover, is better than words to indicate its condition in Bridegport. Just such a picture was received in evidence during the trial (Jordan's Exhibit 16E, at E 4).

*** "E" references are to pages in Exhibit Volume.

d. Concerning The Mooring Fender Stowed Immediately Behind The Aft Coaming Of The No. 1 Hatch And Adjacent To The Damaged No. 6 Pontoon Cover.

A large mooring fender about five feet long and about two and one half feet in diameter made of wood and manila rope and weighing about 1000 pounds was stowed on deck immediately adjacent to the after end of the No. 1 hatch coaming next to the No. 6 pontoon (A 7). At Bridgeport a wire designed to hold the fender was found broken and the mooring fender was loosely stowed (A 8).

When the Chief Mate testified, he said he did not know that the mooring fender was stowed where it was during the voyage (TM 254). In fact, he did not even know that the fender was there during the first three days after the vessel arrived in Bridgeport (TM 255). The master of the "PIRAN" did not know that a fender was stowed there (Exhibit AB, p. 86).

The aft coaming of the No. 1 hatch was bent in a forward position immediately in front of the loosely stowed mooring fender (Exhibits 17; and 23 at E 5). As the Court stated, "there is nothing which would indicate it was at all impossible for that fender to cause the deformation of the coaming" (TM 483).

POINT I

The presence of sea water in the cargo hold of a vessel raises a presumption of unseaworthiness which the carrier has the burden of rebutting. All exceptions to, and limitations upon, the warranty of seaworthiness are narrowly scrutinized. Thus, when a defendant carrier undertakes to prove that sea water entered a cargo hold because of "a peril of the sea", the proof must be affirmative and clear. A mere conjecture or theory, as to what caused sea water to enter the vessel's cargo hold, will not suffice. This is particularly so, when the theory is based upon some alleged giant wave striking the vessel during the night—a wave, incidentally, which no one on board saw, heard or felt, or even bothered to mention in the log.

During the voyage from Newport to Bridgeport the "PIRAN'S" No. 1 hold, where plaintiff's steel was stowed, was flooded with sea water to a depth of 12 feet (TM 52). All of the damage to plaintiff's steel was caused by salt water (TM 82, 83), it being stipulated that when this steel was stowed in the vessel at Newport it was in good order and condition (TM 82, 83).

In the words of Judge Frank, speaking for this Court, in *Wessels* v. *The Asturias* (2 Cir.), 126 F(2d) 999, 1001:

> "Proof of the presence of sea water, it cannot be disputed, raises a presumption of unseaworthiness which the carrier must rebut."

In trying to rebut the presumption of unseaworthiness, which arises when sea water enters a vessel's hold during a voyage, the vessel owner must *affirmatively* prove exactly what caused the entry of the sea water. For, as the Court

stated in *The Samland,* 7 F(2d) 155, 157:

> "The burden imposed upon the claimant is not met by proof that the damage *may* have resulted from a cause for which he is not responsible. On the contrary, he must *affirmatively* show what caused the damage, and that the cause is one for which he is not responsible." (Emphasis ours)

This Court in *The Saturnia* (2 Cir.), 226 F(2d) 147, 149, said:

> "It is well settled that the carrier of goods by sea is prima facie liable for damage to cargo which, although in good condition when received by the carrier, outturns damaged at the end of the voyage, unless the carrier can *affirmatively* show that the immediate cause of the damage was an excepted cause for which the law does not hold him responsible. Schnell v. The Vallescura, 293 U.S. 296, 303-307; Edmond Weil, Inc. v. American West African Line, Inc., 2 Cir., 147 F2d 363, 366." (Emphasis ours)

The reason why this burden of proof is fairly placed upon an ocean carrier was explained by the United States Supreme Court in *Schnell* v. *The Vallescura,* 293 U.S. 296, 303:

> "The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved of liability." (Cases cited.)

Not only must the proof required be *affirmative* in order for an ocean carrier to bring itself within the exceptional case where it is relieved from liability, but the proof must be *clear,* for the burden is a heavy one.

Judge Dobie, in *Arten Maritime Co.* v. *Southwestern Sugar & M. Co.,* 189 F(2d) 488, 491, held that:

> "Proof that seawater entered the cargo tanks raises a presumption of 'unseaworthiness' which the vessel appellant here must rebut by producing clear proof that the loss and damage did *not* result from failure to exercise due diligence to make the vessel seaworthy in fact, and that it *did* result from a peril of the sea. This heavy burden is not carried if the issue is left in doubt." (Emphasis by the Court)

The owner of the "PIRAN", in trying to carry its heavy burden to establish, by affirmative and clear proof, that it was not liable for the salt water damage to plaintiff's steel, attempted to bring itself within the "perils of the sea" exclusion from liability in the Carriage of Goods By Sea Act (COGSA), Section 1304(2)(c) (TM 277, 278).

Judge Learned Hand in *Metropolitan Coal Co.* v. *Howard,* 155 F(2d) 780, 783, said:

> "Third, the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are *narrowly scrutinized.*" (Emphasis ours)

The heavy burden that a shipowner bears in any effort to prove the proximate cause of the damage is not satisfied by proof of a storm. In *The Lassell,* 53 F(2d) 687, 688, it was held that:

> "Proof of a storm alone is not sufficient."

Nor, of course, does proof merely of damage to cargo by sea water prove that the damage was caused by a peril of the sea. *The Folmina,* 212 U.S. 354, 363.

In *Jamison* v. *N.Y. & P.R.S.S. Co.,* 241 Fed. 389, 392, Judge Learned Hand held that:

> "The shipper need not show how the damage occurred; that is the ship's duty, and mere damage by seawater will not alone serve to exonerate the ship, even if it remains totally unexplained.

When an ocean carrier tries to prove what caused seawater to enter its hold, "conjecture would not be permitted to take the place of proof". *The Folmina,* 212 U.S. 354, 363. Nor is some "theory" as to what happened sufficient. *The Lassell,* 53 F(2d) 687.

Accordingly, case law defines with precision the type and quality of proof an ocean carrier must produce to overcome the legal presumption which arises when seawater enters a vessel's hold during a voyage. That proof must be affirmative and clear. It cannot be based upon conjectures or theory. All exceptions to, and limitations upon, the warranty of seaworthiness are narrowly scrutinized.

* * * * * *

The defendants scrupulously refrained from trying to prove a "peril of the sea" by the testimony of any officer or member of the crew who was actually on board the vessel during the voyage from Newport to Bridgeport. This, in itself, is most unusual, for it is indeed a rare admiralty case, which involves an allegation of heavy weather, where the plaintiff is not faced with a parade of ship's officers telling about the worst storm in their long careers.

"PIRAN" officers agreed that it was a rough voyage but they expected rough weather while crossing the North Atlantic during February (A 32; Exhibit AB, p. 81). The Chief Mate, in answer to a question by the Trial Judge, testified that the weather from Newport to Bridgeport was "typical winter weather for the North Atlantic" (A 32).

The Vizcaya, 63 F.Supp. 898, 900, aff'd 182 F(2d) 942, cert. den. 340 U.S. 877, concerns the voyage of a vessel across the North Atlantic during the month of February. Heavy seas and winds of Force 10 were encountered. These winds continued at that intensity for twelve hours. The Court, at page 903 said:

> "The contention that the damage was occasioned by perils of the sea is, in my estimation, ill-founded. True, the weather at times was severe, but considering that the voyage involved crossing the North Atlantic in the winter season, it cannot be said that the weather encountered was not to be anticipated. The weather was not 'catastrophic', or 'of such a nature' as to constitute a good exception in the statute or the bills of lading. (Cases cited.)"

In *Edmond Weil, Inc.* v. *American West African Line* (2 Cir.), 147 F(2d) 363, the vessel crossed the North Atlantic in the winter time and experienced winds up to Force 10 (a whole gale). Judge Learned Hand, at page 366, said:

> "We do not see how less can be asked of her upon such a voyage, than that she shall successfully meet such weather, for surely gales—indeed even 'whole gales'—are to be expected in such waters at such a season."

The Manuel Arnus, 10 F. Supp. 729, aff'd (2 Cir.) 80 F(2d) 1015, is an excellent opinion concerning the weather to be expected during February in the North Atlantic. At page 731, Judge Hulbert noted that:

> "From 4:30 A.M. on February 21 to midnight on February 23rd she hove to and reduced her speed from 13-14 knots to 4-5 knots; she was buffeted by heavy seas and her decks were washed by high waves."

Just as in our case, the defendant in *The Manuel Arnus* (*supra,* at p. 731), tried to prove exceptional weather con-

ditions by placing in evidence "Weather of the Oceans", a publication based upon weather reports received from various ships at sea.

In holding that the defendant had failed to prove a peril of the sea in *The Manuel Arnus* (*supra,* at p. 732), Judge Hulbert said:

> "In my opinion, the weather must be irresistible, overwhelming and extraordinary for the particular time of year to be a good exception and not a common occurrence at that season of the year. The Orcadian, 116 F. 930; The Rappahannock, 184 F. 291; The Governor Powers, 243 F. 961."

In *Middle East Agency* v. *The John B. Waterman* (SDNY), 86 F. Supp. 487, 489, the Court said:

> "There were very heavy seas, a heavy rain squall and at times a wind force of 9 and 10 on the Beaufort Scale. But that kind of weather in the North Atlantic at that time of year, The Schickshinny, 45 F. Supp. 813, at page 817, should have been anticipated in the stowage of cargo. The damage was not due to the perils of the sea or an Act of God."

Faced with repeated statements by officers of the "PIRAN" that heavy seas and high winds are expected during the winter in the North Atlantic—and that the weather during this particular voyage was "typical"—the defendants had to look elsewhere for a different kind of testimony in an effort to prove a "peril of the sea". They finally came up with a retired sea captain—a fine gentleman—who was asked to testify from weather charts reflecting conditions no closer than one hundred miles from the "PIRAN".

Captain Patterson, the retired sea captain, was never on board the "PIRAN" (Exhibit M, p. 4). He has no degree in physics or chemistry, in fact, he has no degree from any institution of higher learning (Exhibit M, p. 4). He has had years of practical experience at sea (TM 383).

Captain Patterson was asked to testify from weather charts published by the U.S. Department of Commerce (Exhibit P). They are based upon reports received from ships at sea (A 65, 66). No report on those charts came from any ship that was within one hundred miles of the "PIRAN" (A 69).

Captain Patterson's testimony was dependent upon a theory. His theory was simply that weather reports from various vessels at sea—none of which was closer than one hundred miles from the "PIRAN"—indicated a "peaking effect" from wave action (A 59). Peaking, he defined, as "* * * a case where waves moving along, two different waves or two different swells meet together, they don't destroy each other, they roll right through one another" (A 58). Peaking "* * * is a phenomenon of bad weather that is by no means unusual, and yet many seamen have gone to sea for many years and never actually encountered it" (A 59).

Captain Patterson testified that the "peaking" phenomenon depended upon several variables. He listed these variables as, (a) the factors of two different wave motions meeting at an angle of about 70 degrees to around 180 degrees (A 60); (b) the height of the wave action (A 60); (c) the wave length (A 60); and (d) the wind (A 61).

As to variable (a) above, Captain Patterson estimated that the waves were meeting at about 150 degrees (A 62). On a scale from 90 degrees to 180 degrees the worst peaking effect would be at 90 degrees (A 62).

As to variable (b) above, Captain Patterson said that there is nothing in the log about the height of the waves and he has not made any assumptions as to the height of the waves (A 62).

As to variable (c) above, Captain Patterson had no information about the wave lengths (A 63).

As to variable (d) above, Captain Patterson said he would look to the log (A 63). The highest wind force recorded in the log was Force 10 (A 32, 33).

Accordingly, Captain Patterson's wave peaking theory (which was intended to prove that some giant, unseen, unfelt, and unheard wave crushed the No. 6 pontoon) is not only based upon reports from ships more than a hundred miles away from the "PIRAN", but it is also based upon four "variables", only one of which was known to Captain Patterson.

After Captain Patterson testified (he was the last to testify about weather conditions) the Trial Judge made the following analysis of his testimony:

> "Secondly, as far as the condition of the sea, the only live witness appearing was the chief mate and he said it was just what was expected in the North Atlantic at this time. Nobody either logged or testified to or observed any of these extraordinary conditions.
>
> "Now, Captain Patterson was a splendid, a fine witness as far as his theories. And he set the stage, and he did get some distance in proving this extraordinary weather. He proved the circumstances were there. But he actually, in response to my questions, presented a number of factors, a number of variables. And he didn't know the extent to which those variables existed or didn't exist, precisely, and that really prevented him obviously from proving with precision what happened.
>
> "The only people who could only do that would be the witnesses, and they couldn't give any testimony, nor did the log report.
>
> "So I don't see how you have proven the extraordinary sea conditions necessary for a peril of the sea." (A 74, 75)

* * * * *

The "one big wave" theory relied upon by the defendants (by necessity since the weather itself was clearly not unusual for a winter voyage across the North Atlantic) has not been well received in our courts. In the fairly recent case of *Nichimen Company, Inc.* v. *M.V. "Farland"* (2 Cir.), 462 F(2d) 319, 324, the Master testified that, during Force 11 weather, a 60-foot wave "lifted the 'Farland' up, broke over her and dropped her 'just like she fell off a rock'." The Trial Judge, in rejecting this allegation, had noted at page 324, that:

> "There is no reference to a 60-foot wave in either the log or in the radio-telegram sent approximately two hours after the time the log indicates that the coils had shifted."

Chief Judge Friendly, at page 330, in approving the Trial Judge's rejection of the alleged 60-foot wave theory, noted that it was "a phenomenon apparently unnoticed by anyone else on the Farland."

In our case *no one* testified to seeing, hearing or feeling a giant wave. And, just as in the *Farland* case, there was no entry in the log about any big wave of any kind (Exhibit E, A 123-133). Captain Patterson, defendants' expert, testified that any sudden catastrophic event which had a very adverse effect upon a ship, should be entered in the log (TM 409).

In our case, the Trial Judge asked defense counsel the following question and received the indicated answer:

> "The Court: Does he (The Master) say anything about seeing an unusual wave?
> "Mr. Ryan: No, no." (TM 449)

New Rotterdam Insurance Co. v. *S.S. "Loppersum"*, (SDNY) 215 F.Supp. 563, 566, is another case where the Master did not see the big wave, which he said "threw

him off his feet on the bridge". The Court did not credit the story.

There is little doubt but that defendants' claim, about a huge wave in the night, which no one on board saw, heard or felt, or referred to in the log, is of an unusual kind. Years ago, Judge Addison Brown in *Greenwood* v. *The Fletcher,* 42 Fed. 504, 505 made a statement which has lost none of its validity through the years, when he said:

> "The claim, being, therefore, of an unusual kind, ought to be sustained by evidence correspondingly convincing."

It is an understatement to conclude that defendants' phantom wave theory is unusually unconvincing.

* * * * * *

In an effort to bolster its position concerning a "peril of the sea", the vessel owner did its best to magnify damage to the vessel itself, overlooking, of course, an important statement in its own log.

When on February 9th the No. 6 pontoon on the No. 1 hatch was found in the 'tween deck in a collapsed condition the Master obviously had the vessel examined, for he entered in the log for that date the following pertinent comment:

> "There were noted few minor damages on the deck." (Exhibit E, A 132).

Captain Patterson, defendants' expert, referred to that entry (TM 410).

During the testimony of the Chief Mate, a defense attorney obviously tried to repudiate the log entry about "minor damages on deck", by showing the witness pictures. After that testimony the Trial Judge said:

> "I haven't seen any pictures showing serious setting down of the deck of the ship". (A 34)

POINT II

"Seaworthiness" and "peril of the sea" are related by definition. The "peril of the sea" defense can only be valid—assuming it can be proved—provided the vessel was in all respects seaworthy at the commencement of the voyage. The burden of proving "seaworthiness" is upon the vessel owner. Superficial inspections and general statements of seaworthiness are not sufficient. Defendants did not prove that the No. 6 pontoon on the No. 1 hatch was seaworthy when the "Piran" left Newport.

"In a sense, 'seaworthiness' and 'peril of the sea' are related by definition, for the seaworthiness of a vessel consists in part of her ability to stand up under reasonably expectable conditions, while the peril of the sea, on the other hand, is the sort of action of the marine elements that is not reasonably expectable and that consequently can overcome the strength of the seaworthy ship. Thus, where sea water unexplainedly enters the hold, there is a presumption of unseaworthiness, for the well-found vessel does not ship sea water in the hold under normal conditions; the carrier's hope of rebutting this presumption lies in establishing that the entry of sea water was caused by a 'peril of the sea'—an occurrence so violent and unusual as to overcome the defenses of even a seaworthy ship". The *Law Of Admiralty,* by Gilmore & Black, first edition, page 141.

The defendants failed to prove the "PIRAN" was seaworthy when it left Newport, in two respects. *First,* they failed to prove that the No. 6 pontoon on the No. 1 hatch was seaworthy. *Second,* they failed to prove that the 1000-pound fender behind the No. 6 pontoon was stowed in seaworthy fashion.

1. As To The Failure To Prove That The No. 6 Pontoon Was Seaworthy:

A pontoon cover over a vessel's hold takes the place of the vessel's deck where it is positioned. It must be just as strong as a seaworthy deck, if cargo stowed under it is to be protected from the elements.

Steel cargo, such as was carried on the "PIRAN", is notoriously susceptible to rust and pitting damage from salt water. A carrier is obligated to know the characteristics of the cargo it accepts for carriage. *Bank Line* v. *Porter,* 25 F(2d) 843, 845, cert. den. 278 U.S. 623. Accordingly, the defendants were obligated to know that the hatch covers had to be particularly strong and tight, so that sea water would not reach the steel cargo.

Defendants tried to establish the seaworthiness of the No. 6 pontoon through a witness who had inspected the vessel in Rotterdam, about 400 miles from Newport, and before plaintiff's steel was ever loaded on the vessel in Newport, and, of course, before the voyage to Bridgeport commenced. The lack of knowledge possessed by this witness, a Mr. Jonker, who was trying to testify about an inspection made nearly seven years before, is best demonstrated by the language of his own testimony:

> "Q. Do you have any notes you may have made in connection with a survey of the vessel in January of 1968?
>
> "A. I couldn't have them." (A 84)
>
> "Q. Is there anything in your report that talks about or mentions the details of your inspection of the pontoon covers?
>
> "A. No." (A 84)
>
> "Q. On the PIRAN were they (the pontoon covers) numbered?
>
> "A. I couldn't tell you.

"Q. Were you in Newport, Wales, with the ship while it was loading steel for a trip to the United States?

"A. No, sir.

"Q. You don't know what the condition of the ship was in Bridgeport, do you?

"A. No, sir." (A 85)

"Q. Were the pontoons in place on the No. 1 hold when you inspected them, or were they piled one on top of the other on the deck of the vessel?

"A. I don't know.

"Q. Do you know if the 'tween deck was in place while the vessel was in Rotterdam?

"A. No, sir.

"Q. Do you know how many pontoon covers were on this vessel?

"A. No, sir.

"Q. Do you know, if they were piled on top of each other, how many were piled on top of each other?

"A. No, sir.

"Q. You have no way of knowing, do you, that the pontoons you examined in Rotterdam were the same pontoons that were on the vessel when it left Newport, Wales, for the United States?

"A. No, sir.

"Q. You have no way of knowing, do you, that if the pontoons were in fact the same, whether or not they had in any manner been damaged between the time you examined them and the time the vessel left Newport, Wales?

"A. No, sir.

"Q. Did you check for hatch covers against the plans?

"A. I don't know." (A 85, 86)

The above exemplifies the kind of testimony the defendants relied upon, when trying to shoulder their burden

of proving the good order and condition of the pontoon covers at the time the vessel left Newport.

The emphasis the defendants placed upon Rotterdam inspections seems to have been poorly received by the Trial Judge, who said:

> "And you can put in all the evidence you want about inspections and repairs at Rotterdam, but I don't think I am going to know much more about the cause of that pontoon bending then I do right now. Maybe there is something that I missed that is hidden in these records, but I really don't think there is". (A 33)

The vessel owner took the deposition of Mr. Svonko, the vessel's bosun (Exhibit AC) in an effort to demonstrate inspections at Newport. The following testimony indicates the vessel owner's lack of success in this respect:

> "Q. What were your duties on the PIRAN?
>
> "A. I was a bosun.
>
> "Q. And as a bosun what did you do?
>
> "A. I would like to know whether to go into details or just a little to say about it.
>
> "Q. Well, a general description of what your duties were.
>
> "A. It is my duty as a bosun, that I will be in charge of all the jobs on the deck as per order of chief mate, that I prepare work for the sailors, that I prepare their tools, that I give them work, that I control their work, that during movement of the vessel, in ports, my duty is on the bow, that I manipulate winch on the bow, that during tying of the vessel that I will come on with the sailors on the bow, that I will be present during opening and closing of the hatches.
>
> "The Interpreter: He is asking if I understand.
>
> "A. That before departure of the Vessel to check whether all the hatches are properly closed and se-

> cured, that I check all the items on the deck, not only on the deck but also in other compartments whether it is tied and secured properly. That is basically it." (A 110, 111).

Not only did the bosun not testify as to a "seaworthy" inspection of the hatch pontoons, but he did not even list it as one of his duties.

If the defendants believe that there is any additional evidence that tends to prove the seaworthy condition of the No. 6 pontoon of the No. 1 hatch *at the time the* "PIRAN" *left Newport,* they should, in fairness to the Court, detail that evidence in their answering briefs. A failure to do so will certainly be commented upon in plaintiff's reply brief.

In trying to find proof that the No. 6 pontoon was seaworthy when the "PIRAN" left Newport, the defendants would do well to bear in mind the following comments of the Courts:

In *Union Carbide* v. *The Walter Raleigh,* 109 F.Supp. 781, 792, aff'd (2 Cir.) 200 F(2d) 908, the Court held that:

> "The rule as to inspections requires that the inspection be made before the vessel breaks ground. Seaworthiness of a part of the ship's equipment on the voyage just ended is not sufficient. Something might happen to the equipment while the vessel is in port. It may be because of this possibility that a proper inspection is supposed to be made prior to commencement of each voyage."

In *Warner Sugar Refining Co.* v. *Munson S.S. Line,* 23 F(2d) 194, 197, aff'd (2 Cir.) 32 F(2d) 1021, the Court said:

> "If a vessel owner is satisfied to rely on external appearances that the vessel and her appliances are in such good order that it is safe to take cargo on board,

> instead of making fair examinations and tests, the vessel owner assumes the responsibility for such defects as may exist and which a diligent examination would reveal."

In *The Edwin I. Morrison,* 153 U.S. 199, 215, the Supreme Court said:

> "The obligation rested on the owners to make such inspection as would ascertain that the caps and plates were secure."

In *Ore S.S. Corp.* v. *D/S Hassel* (2 Cir.), 137 F(2d) 326, 329, this Court held that:

> "A mere superficial inspection of a ship is insufficient to establish an exercise of due diligence on the part of the owner to make her seaworthy. (Cases cited)"

The United States Supreme Court in *The Folmina,* 212 U.S. 354, 360, noted that:

> "The Folmina was a steel steamship of the highest class in Lloyd's register. Before starting for Japan she was in drydock at New York and was there surveyed by a Lloyd's surveyor. Some time before she had been in dry dock at Cardiff, where some repairs were made to the rudder, rudder quadrant and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe."

This proved insufficient.

The failure of the defendants to prove the seaworthiness of the No. 6 pontoon on the No. 1 hatch, at the time the vessel left Newport, is compounded by the inexplicable manner in which the pontoon was allegedly tested after the vessel reached New Orleans.

No notice that any tests were going to be made upon the pontoon was given to the cargo owners or their attorneys (TM 431).

This Court in *The Westchester,* 254 Fed. 576, 578, had the following to say about the failure to give an opposing party notice of a survey:

> "The procedure of claimants in giving no notice to libelant of the survey on the Westchester is objectionable and inexplicable, if it was expected to use that survey as a piece of evidence. The importance of surveys in maritime litigation has often been recognized. The Mason, 249 Fed. 721. But, to say the least, it greatly diminishes the value of any survey considered as documentary evidence, and (even if the surveyors are called as witnesses) creates an air of unfairness about the whole proceeding, to exclude therefrom any known person who may claim against the injured res or have suit brought against him by reason of that injury. The matter is not important in this cause; it is mentioned because it is very important in proper admiralty practice."

Not only did the defendants fail to give the plaintiff notice of a metallurgical survey of the No. 6 pontoon, but when the survey was actually made it was performed on a sample taken from the pontoon's cover (TM 432), and not from any of the struts, or "strength" members of the pontoon. This cover, which was tested, was only 32-hundredths of an inch thick (A7). Obviously, if anyone wanted to perform any kind of a meaningful test (even in secret) it would test the strength members of the pontoon —not its cover.

Despite the following comment from the Trial Judge, defendants never offered any proof concerning the sea-

worthiness of the pontoons' strength members:

> "Now, I don't want to quibble, but it does seem to me, if there was going to be a test made, that any kind of analysis, why, probably something should have been done with those struts or strength members." (A74)

2. As To The Failure To Prove That The 1,000-Pound Fender Was Stowed In A Seaworthy Fashion:

A large mooring fender weighing about 1,000-pounds was stowed on deck immediately adjacent to the aft end of the No. 1 hatch coaming next to the No. 6 pontoon (A7). At Bridgeport a wire designed to hold the mooring fender was found broken and the mooring fender was loosely stowed (A8).

The Master of the "PIRAN" did not know that the fender was stowed behind the coaming (Exhibit AB, p. 86). The Chief Mate did not know that the fender was stowed behind the coaming during the voyage (TM 254). In fact, he did not find that to be the case until three days after the vessel arrived in Bridgeport (TM 255).

Clearly under these circumstances, the seaworthiness of the wire restraining the heavy fender was important. A metallurgical test would be in order. Once again, as in the case of the pontoon, defendants claimed to have the wire tested, but once again they failed to notify the cargo owners or their attorneys (TM 431).

Plaintiff, Jordan, demanded the production of some of the wire in Court. When it was not produced the Trial Judge expressed his feelings on the subject, during the following colloquy:

> "The Court: So then there would be maybe five feet of the wire, the so-called bridle, right?
>
> "Mr. Ryan: Approximately.
>
> "The Court: I don't understand why a test had to gobble up every bit of that wire.

"Mr. Ryan: Your Honor, the simple point is this: No request was made for this, until after all discovery had been completed, with the one exception of the boatswain's testimony granted to us by Judge Lasker. Now this is the first time—

"The Court: Why do you need a request? You are coming into court and you are producing evidence about wire—

"Mr. Ryan: No, no.

"The Court: —that is not available for anybody to look at, it is not available for anybody to take their own tests about." (A44, 45).

The Trial Judge held that he was not receiving any evidence about the actual strength or weakness of the wire (A45). Accordingly, an important element of proof—to establish seaworthiness of the fender's stowage—is missing.

It is, of course, no part of the plaintiff's burden of proof to show how the damage occurred. That is the ship's burden. *Jamison* v. *New York & P. R. S. S. Co.*, 241 Fed. 389, 392. However, a loosely stowed 1,000-pound fender battering away at the hatch's coaming adjacent to the No. 6 pontoon cover during a storm could have at least been a contributing factor to the collapse of an old pontoon.

William F. Watkins, testified by deposition as an expert witness. He is a marine surveyor and a 1942 graduate of the Massachusetts Institute of Technology with a Bachelor of Science degree in marine engineering and naval architecture (A88). He actually went on board the "PIRAN" in Bridgeport on February 13, 1968 for the purpose of surveying the damage (A89), to the No. 1 hatch and the area around it (A89).

When Mr. Watkins was shown a picture of the No. 6 pontoon cover for the No. 1 hatch, he was asked "could a

distortion such as shown in that picture have been caused by the force of water alone?", and he answered, "In my opinion, no, sir" (Exhibit 19, p. 15).

Mr. Watkins said that, in his opinion, the mooring fender did the damage to the coaming in front of it as well as the damage to the mast house behind it (A90).

In the section of Mr. Watkins' survey report labelled "Conclusions", he had this to say:

> "In the opinion of the undersigned Surveyor, the cause of the buckling and collapse of the after hatch cover of the No. 1 Hatch followed by the buckling of the next hatch cover forward, was the result of the mooring fender (estimated to weigh in the order of 800 to 1,000 lbs.) stowed between the mast/winch house and the after coaming repeatedly striking the top of the hatch coaming from the action of the seas on deck." (A118)

Dr. Samuel Korman was another expert witness who testified by deposition. He has a Ph.D in chemistry and finance from Columbia University, a Master's degree in chemistry from Columbia University, and a Bachelor of Science degree from New York University (A97). He has been a consultant to the United States Atomic Energy Commission, the Department of the Interior and the Department of Defense (A97). He was Professor of Metallurgical Engineering at the Polytechnic Institute and is presently Senior Research Professor, School of Engineering at Columbia University (A97). In addition, he is the author and/or co-author of over fifty papers and patents in the scientific and metallurgical field (A98).

When Dr. Korman was shown the picture of the damaged pontoon (Exhibit 16 at E4) he was asked if, in his opinion, he could "say whether or not that damage could have been caused by wave action?" His answer was: "No. I would

not expect it to be formed by the action of water in the form of a wave" (A 98).

No wonder the Trial Judge in holding against the plaintiff was frank enough to say:

> "I realize that there are elements of uncertainty in this kind of a finding. None of us were sitting on the spot observing the situation." (A13)

The Trial Judge overlooked the well-documented fact that several people "were sitting on the spot observing the situation". Those people were the officers and the crew of the "PIRAN"—all employees of the vessel owner. And not a person on that vessel during the voyage testified to seeing, hearing or feeling any big wave. Nor did any officer refer to any such event in the log.

The defendants certainly chose a most unusual way to shoulder their legal burden of proof—ignore the testimony of those who "were sitting on the spot observing the situation", and rely on Captain Patterson and Mr. Ganly, who not only were not "sitting on the spot" during the voyage, but they did not even bother to go to the "spot" when the voyage was over.

Since the burden of establishing a peril of the sea by affirmative and clear evidence is upon the ocean carrier, the "elements of uncertainty" in defendants' proof as noted by the Trial Judge (A13), should have required that the issue be resolved in favor of the plaintiff.

In *The Edwin I. Morrison,* 153 U.S. 199, 212, the Supreme Court of the United States said:

> "In any aspect, the real point in controversy is, did the respondents so far sustain the burden of proof which was upon them as to render the probability that the cap and plate were in good condition and knocked off through extraordinary contingencies so strong as

to overcome the inference that they were not in condition to withstand the stress to which on such a voyage it might reasonably have been expected they would have been subjected? *If the determination of this question is left in doubt, that doubt must be resolved against them.*" (Emphasis added)

In *The Folmina,* 212 U.S. 354, 363, the Supreme Court of the United States held:

> "As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier."

POINT III

It is the ocean carrier's burden of proof to establish that it exercised "due diligence" to make the vessel seaworthy at the time the voyage commenced. This obligation is non-delegable. A mere superficial inspection does not suffice. The evidence concerning due diligence is strictly construed.

This Court in *W. R. Grace & Co.* v. *Panama R. Co.,* 285 Fed. 718, 722, held that:

> "The burden of proof was upon the appellant (the ocean carrier) to show the exercise of due diligence. The Southwark, 191 U.S. 1; The Wildcroft, 201 U.S. 378; The Folmina, 212 U.S. 354."

The Carriage of Goods By Sea Act (COGSA), 46 U.S.C. 1304(1), states in pertinent part:

> "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of

> due diligence shall be on the carrier or other persons claiming exemption under this section."

Due diligence must be exercised just before the vessel breaks ground. In connection with our case—where the seaworthiness of the No. 6 pontoon and stowage of the mooring fender is in question—any due diligence which defendants claim to have exercised, must have been exercised in Newport, Wales, not Rotterdam, The Netherlands.

Thus in *Union Carbide* v. *The Walter Raleigh,* 109 F.Supp. 781, 792, aff'd (2 Cir.) 200 F(2d) 908, the Court held that:

> "The rule as to inspections requires that the inspection be made before the vessel breaks ground. Seaworthiness of a part of the ship's equipment on the voyage just ended is not sufficient. Some things might happen to the equipment while the vessel is in port. It may be because of this possibility that a proper inspection is supposed to be made prior to commencement of each voyage."

An ocean carrier's obligation to exercise due diligence is non-delegable. *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp.* (SDNY), 112 F.Supp. 630, 637; *Ore S.S. Co.* v. *Hassel,* 137 F(2d) 326, 330.

The diligence required by the law to make a vessel seaworthy is that of all the vessel owners' employees regardless of their position. In *International Nav. Co.* v. *Farr & Bailey,* 181 U.S. 218, 226, the Supreme Court of the United States, said:

> "The obligation was to use due diligence to make her seaworthy before she started on her voyage, and

> the law recognizes no distinction founded on the character of the servants employed to accomplish that result."

In *The Alvena* (SDNY), 74 Fed. 252, 254, this Court held that:

> "The requirement of 'due diligence', is not satisfied by the mere appointment of competent persons to repair. Due diligence in repair and equipment must be exercised, in fact."

Due diligence in gathering certificates of seaworthiness does not satisfy the obligation of a vessel owner to use actual due diligence to make its vessel seaworthy. *The Otho* (SDNY), 49 F.Supp. 945, 950; *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp* (SDNY), 112 F. Supp. 630, 639; *The Archer,* 29 F(2d), 134, 136.

The burden placed upon a vessel owner to exercise due diligence is so heavy that, not even the approval of a shipper as to the seaworthiness of a vessel (of course, no such approval was given in our case), relieves the owner from his affirmative duty to use due diligence. *The Edwin I. Morrison,* 153 U.S. 199, 210; *Oxford Paper Co.* v. *The Nidarholm,* 282 U.S. 681, 684.

A superficial inspection does not satisfy a shipowner's obligation to use due diligence. Thus, in *Warner Sugar Refining Co.* v. *Munson S.S. Line,* 23 F(2d) 194, 197, aff'd (2 Cir.) 32 F(2d) 1021, said:

> "And a shipowner has not sustained the burden of exercising due diligence by a mere superficial inspection; nor where the inspection or the evidence is insufficient to support a finding of good condition, or that a diligent effort had been made to put her in good condition. (Cases cited)"

This Court in *Ore S.S. Corp.* v. *D/S/A Hassel* (2 Cir.), 137 F(2d) 326, 329, held that:

> "A mere superficial inspection of a ship is insufficient to establish an exercise of due diligence on the part of the owner to make her seaworthy. (Cases cited)"

The burden of an ocean carrier to prove due diligence is as heavy as it is, because it is an effort to escape liability for an unseaworthy vessel. Any exceptions to the warranty of seaworthiness are narrowly scrutinized. *Metropolitan Coal Co.* v. *Howard* (2 Cir.), 155 F(2d) 780, 783; *Standard Oil Co.* v. *Anglo-Mexican Petroleum Corp.*, 112 F.Supp. 630, 637.

We call upon the vessel owner, in its answering brief, to set forth in detail just what evidence it claims supports its contention that it used due diligence in Newport to make the vessel seaworthy, in respect to the No. 6 pontoon and the stowage of the mooring fender, for the voyage from Newport to Bridgeport. Any failure to detail just what evidence the vessel owner is relying upon, in this respect, will be commented upon in our reply brief. We are confident that evidence, of a quality sufficient to satisfy the vessel owner's burden of proof, is not available.

Conclusion

When sea water enters a vessel's hold during a voyage and damages cargo, the vessel owner has the burden of proving by clear and affirmative evidence—not by conjecture or theory—that a specific "peril of the sea" was the efficient cause of the entry of seawater.

However, a "peril of the sea" defense—assuming it can be proved—cannot be relied upon until the vessel owner has first established that the vessel was, in fact, seaworthy

just prior to, and at, the commencement of the particular voyage, during which the cargo in question was damaged.

If a vessel owner concedes that his vessel was unseaworthy just prior to, and at, the commencement of the voyage during which cargo is damaged by sea water, his only way of escaping liability, under the terms and conditions of the Carriage of Goods by Sea Act (COGSA), is by proving that he used "due diligence" to make the vessel seaworthy just prior to, and at, the commencement of said voyage.

When, after conceding the unseaworthiness of his vessel, a vessel owner tries to prove "due diligence" to make the vessel seaworthy just before it broke ground, his proof will be narrowly scrutinized. Superficial inspections and general statements of condition are not sufficient. It is essential that proof of alleged "due diligence" specifically detail just what was, in fact, done in an attempt to make the vessel seaworthy.

(If defendants claim that any of the statements of law set forth above, following the heading "CONCLUSION", are invalid, they should, in fairness to the Court, indicate in their answering briefs, just which of these statements of law they consider invalid.)

Defendants never did prove that a specific "peril of the sea" was the efficient cause of the entry of sea water into the No. 1 hold. The weather actually experienced during the voyage was typical winter weather for the North Atlantic. No one on board saw, heard, or felt a giant wave. No entry about any such catastrophic event was recorded in the log. Defendants attempt to use Captain Patterson's testimony, to establish a "peril of the sea" defense, was a complete failure. Testifying from weather reports, sent by other ships at sea—none of which were within one hundred miles of the "PIRAN"—Captain Patterson had a theory that the damage was caused by "peaking" wave action. However, that theory concededly depended for its

purported validity upon four variables—only one of which (the wind force) was known to Captain Patterson. No wonder that the Trial Judge, after Captain Patterson's testimony made the following comment:

> "And he (Captain Patterson) didn't know the extent to which those variables existed or didn't exist, precisely, and that really prevented him obviously from proving with precision what happened." (A75)

The vessel owner failed to establish that the No. 6 pontoon cover on the No. 1 hatch was seaworthy just prior to, and at, the commencement of the voyage from Newport. This pontoon cover, possibly nine years of age, with an unknown history, was movable, interchangeable and replaceable. It, with other similar pontoon covers, could be piled on top of each other while on deck or any other place. General testimony by a surveyor about a survey in Rotterdam, nearly seven years before, during which he could remember nothing about this pontoon cover (see this brief, pages 17 and 18), does not meet the required standard of proof. This prompted the Trial Judge to make some uncomplimentary remarks about the Rotterdam testimony (A34).

The vessel owner failed to prove that the 1,000-pound mooring fender—found in Bridgeport loosely stowed with a broken wire immediately adjacent to a bend in the coaming—had, in fact, been stowed in a seaworthy fashion at the time the vessel left Newport.

At a time, when the very nature of the damage to the No. 6 pontoon cover and the mooring fender wire, called for thorough metallurgical tests, the vessel owner, without notice to the cargo owners or their attorneys, tested only a section of the pontoon cover and failed to test any part of the pontoon's struts or "strength" members. Despite the fact that the broken wire was at least

five feet long, the vessel owner retained none of it for production in Court or tests by the cargo owners.

In every essential element of their case, defendants failed to present evidence of a nature and kind necessary to comply with the standard of proof required by law of those who have the burden of establishing a "peril of the sea", "seaworthiness" and "due diligence". With reason and commendable frankness, the Trial Judge felt constrained to acknowledge "elements of uncertainty" in his decision (A13).

WHEREFORE, the judgment dismissing the complaint of Jordan International Company *in rem* against the vessel and *in personam* against the defendants should be reversed, and the case remanded to the District Court to enter judgment on the merits for Jordan International Company against the vessel and the defendants, and to compute said plaintiff's damages, plus interest and costs.

Respectfully submitted,

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